

Washington, D.C. 20554

In re Applications of

STEPHEN O. MEREDITH

AL HAZELTON

For a Construction Permit for
a New FM Station on Channel 243C1
at Audubon, Iowa

MM DOCKET NO. 93-300

File No. BPH-920430MD

File No. BPH-920430ME

To: Honorable John M. Frysiak
Administrative Law Judge

REPLY TO OPPOSITION TO MOTION TO ENLARGE ISSUES

Stephen O. Meredith ("Meredith"), by and through counsel, and pursuant to §1.294 of the rules, hereby submits his Reply to the "Opposition To Motion To Enlarge Issues" filed by Al Hazelton ("Hazelton") in the above-captioned proceeding on February 4, 1994.¹ In support whereof, the following is shown:

Hazelton Has Admitted His False Certification

1. In his Opposition, Al Hazelton admits that, after he signed his Audubon application, changes were made to the engineering portion of the application. Hazelton contends that he reviewed a previous version of the engineering prior to signing and that an error was discovered only after he had signed the application and forwarded it to his FCC attorney for filing.

¹ This Reply is timely-filed. Hazelton submitted his Opposition on February 4, 1994. Pursuant to §1.4 and §1.294(c) of the Commission's Rules, Meredith's Opposition is due five days later plus three days for mail service, excluding holidays. The Commission was closed on February 11, 1994, due to inclement weather, and therefore, Meredith's Opposition is due today, February 17, 1994. See §1.4(e), (g) & (h) of the rules.

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2. As Hazelton readily admits, when he discovered that the application he had reviewed and certified to be accurate and complete contained a material defect, rather than properly remedying the situation by re-certifying a corrected version, Hazelton permitted his falsely-certified application to be filed with the Commission. Such an action was a knowing misrepresentation contained in a document submitted to the Commission and was a direct violation of the Commission's rules and policies.

The Application That Hazelton Signed Was Not The Completed Application Later Submitted To The Commission

3. Hazelton refuses to recognize the significance of his act. It is undisputed that he reviewed some version of the engineering portion of his application prior to signing.² However, the salient fact is that Hazelton did not review the final version of his engineering, the version that he later submitted to the Commission and that is currently a part of his application. Furthermore, there is no evidence that Hazelton even reviewed a copy of his revised engineering prior to his application being filed. He claims to have discussed the changes with his engineer but does not state that he reviewed even a faxed copy of his revised engineering before it was filed.

² Since he has never produced a copy of this phantom earlier version of his engineering, it is impossible to test the accuracy of Hazelton's contentions. Only by enlarging the issues in this case and ordering Hazelton to produce those documents outlined in the Motion To Enlarge will the Commission be able to verify the extent of the changes made to Hazelton's application after he had signed.

Therefore, the version reviewed by Hazelton before he signed was not, as he claims, a full and final version of his application.

4. The fact that, at the time he was signing, Hazelton believed his application was complete, is unavailing. Hazelton later learned that his application contained an error and, by permitting his application to be changed and filed with the Commission, his original signature was thereby invalidated and a false certification was filed.

Hazelton's Intent To Deceive Was Obvious

5. Hazelton argues that he never attempted to deceive the Commission. See Opposition at p. 3.³ However, Hazelton's motive to deceive is clear. Time was running out. The window for filing applications for the new Audubon allotment was going to close on April 30, 1992. Hazelton discovered an error in his application only one day before - on April 29, 1992. He admits that he had already sent the signed version of his application to his FCC attorney the day before on April 28, 1992. He knew that the problem contained in his application - a short-spacing defect, if not corrected, would ultimately result in his

³ Hazelton contends that he should be given credit for not instructing his engineer to "back date" the engineering portion of the application to avoid any question of impropriety. See Opposition at footnote 2. In essence, Hazelton is arguing that he may have lied to the Commission but that he made no attempt to cover up his actions. However, the fact that Hazelton chose to avoid compounding his problem by instructing his agent to join him in his misrepresentation does not change the fact that he knowingly permitted his application to be filed with a false certification.

application being returned.⁴ However, rather than correcting this problem on April 29, 1992 and re-signing a new and final version of his application, Hazelton realized that time was slipping away and he chose to take the easy (and improper) way out. He instructed his engineer to send the corrected engineering directly to his FCC attorney and, by so doing, permitted his application to be filed with a false certification attached.

Commission Precedent Supports The Addition Of Issues

6. Commission policy holds that: "no material [may] be added to an application once it has been signed by the licensee, unless such material has been shown to the licensee and unless the application's thereafter redated, re-signed and reverified." WMOZ, Inc., 36 FCC 201, 218 (1964) (emphasis added). In this case, Hazelton permitted a revised set of engineering data to be added to his application after he had signed it. By refusing to properly re-sign his application, Hazelton violated long-standing Commission policy.

7. Hazelton claims that he at least had some version of his engineering in front of him when he signed his application and that this fact distinguishes his case from those where the

⁴ Hazelton adds that he was previously a station engineer and that he gave his engineering a more thorough review than most non-technical applicants would. See Opposition at p. 3. However, if such were the case, then why didn't Hazelton catch the short-spacing defect during his "final" review on April 28, 1992, and demand that his consulting engineer correct it prior to affixing his signature?

applicant had no engineering whatsoever. See, Triangle Broadcasting Co., 49 RR 1601 (A.L.J. 1981). However, Hazelton's attempt to distinguish his actions does not change the Commission's core policy - that an applicant cannot sign his application and later add to or change material in it. "No one can swear to an event which has not yet transpired, or to material which is not yet existence." Post-Newsweek Stations, Florida, Inc., 34 RR 2d 676, 680 (Rev. Bd. 1975), citing, Johnston Broadcasting v. FCC, 175 F.2d 351, 354 (D.C. Cir. 1949). It was impossible for Hazelton to swear to the accuracy of an application which was later changed by adding new engineering material.

8. Hazelton cites Edward W. St. John, 67 RR 2d 774 (1990) and argues that "there is no need for a hearing issue in this matter." Opposition at p. 4. However, that case is easily distinguishable from the case at bay[?]. In Edward W. St. John, the applicant signed a completed application and no material was added to it after it was signed. Id at 776. Furthermore, the application contained a minor defect - the date when the FAA notice was to be mailed was incorrect. Id. The Commission found this error to be "non-material and harmless." Id.

9. In this case, Hazelton did not sign a complete and final version of his application and his application was later changed by adding corrected engineering. Hazelton argues that the change was not material, thus he should be excused. However, WMOZ, Inc., supra, holds that no changes can be made to an application,

whether material or not, after it is signed, in the absence of re-certification. Moreover, the defect that was corrected in Hazelton's application was, in fact, material. Hazelton's engineer admits that his application, as originally signed, included a short-spacing defect. See Opposition at Exhibit B. This was a serious problem that would have prevented Hazelton's application from proceeding through the FM processing line and lead to the return of the Hazelton application. Hazelton himself admits that the changes that were made to his application were done "to ensure that the Commission's engineering standards, including the "hard look" standards, were fully met." Opposition at pp. 2-3 (footnote omitted).⁵ This statement directly contradicts Hazelton's present claim that the error contained in his application was not material.

Conclusion

10. Meredith has raised substantial and material allegations of fact that warrant enlargement of the issues in this proceeding. See §1.2299(d) of the rules. The evidence presented by Hazelton in his Opposition, rather than resolve the serious allegations raised by Meredith, has further complicated matters. As outlined above, serious questions remain concerning Hazelton's actions with regard to the facts and circumstances

⁵ While the Commission subsequently relaxed its "hard look" FM processing standards, those standards were in effect when Hazelton filed his application in April, 1992. See, Processing Procedures for Commercial FM Broadcast Applications, 70 RR 2d 1605, 1611 (1992) (rule changes effective August 7, 1992).

surrounding certification. The only true way to resolve these lingering questions is to enlarge the issues in this proceeding and permit full inquiry into the matter.

WHEREFORE, the above premises considered, Stephen O. Meredith respectfully requests that the issues in this proceeding be enlarged against Al Hazelton and that Hazelton be ordered to produce those documents outlined in the Motion To Enlarge Issues.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Lori Paige DiLullo, a secretary in the law firm of Smithwick & Belendiuk, P.C., certify that on this 17th day of February, 1994, copies of the foregoing were sent via first class mail, postage pre-paid, to the following:

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